Supreme Court, U.S.
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93-227

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

EMPLOYERS INSURANCE OF WAUSAU,

Petitioner,

v.

THE CELOTEX CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a writ of mandamus should be issued by this Court to correct the errors of the court of appeals in dismissing an appeal from the district court and refusing to issue a writ of mandamus requiring the district court to exercise its jurisdiction to review the merits of a bankruptcy court's order remanding an action to state court, where such errors denied Wausau review by an Article III court of a decision by an Article I tribunal denying Wausau access to the federal courts and controlling the Article III court's jurisdiction, contrary to the United States Constitution, the Judiciary Code and this Court's decision in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) *("Marathon")?*

LIST OF PARTIES AND RULE 29.1 LISTING

The names of all parties appear in the caption of the case. Petitioner Employers Insurance of Wausau, A Mutual Company, named herein as Employers Insurance of Wausau, has no parent corporation. Employers Insurance of Wausau is affiliated with Nationwide Insurance Group and all of Petitioner's subsidiaries are wholly owned.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

No. _____

EMPLOYERS INSURANCE OF WAUSAU,

Petitioner,

-against-

THE CELOTEX CORPORATION,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

Employers Insurance of Wausau ("Wausau") petitions for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The orders of the court of appeals dismissing Wausau's appeal and denying its petition for a writ of mandamus are reprinted in the appendix hereto at (1a-2a). The Eleventh Circuit's orders denying petitioner's petition for rehearing and suggestion for rehearing en banc (9a-11a), and the opinions of the district court that gave rise to the appeals and the petition for a writ of mandamus (3a-5a, 12a-14a) and the opinion of the bankruptcy court (6a-8a) are also reprinted in the appendix.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 1651. The orders of the court of appeals were entered on March 5, 1993. The Eleventh Circuit denied Wausau's timely petition for rehearing on May 12, 1993.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issues presented by this petition generally implicate Articles I and III of the Constitution of the United States, relating to the constitutional basis for, and the powers of, the bankruptcy courts, including the following specific provisions:

U.S. Const. art. III, § 1

> The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a

Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const. art. I, § 8, cl. 4

The Congress shall have Power ...To establish... uniform Laws on the subject of Bankruptcies throughout the United States.

The question presented also implicates 28 U.S.C. §§ 158 and 1452, relating to appeals from the bankruptcy court to the district court and the removal from other courts of pending claims related to bankruptcy cases, respectively, which statutes are reproduced in the appendix at 15a-17a.

STATEMENT OF THE CASE

A. Proceedings in the Bankruptcy Court

On October 12, 1990, The Celotex Corporation and Carey Canada, Inc. ("Debtors") filed voluntary petitions for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330. On Debtors' motion, the bankruptcy court entered an order, dated October 17, 1990 (the "October 17th Order"), that all litigation of any kind involving Debtors, including litigation initiated by Debtors, be stayed. The purpose of the October 17th Order was to centralize the various nationwide litigations affecting Debtors in the bankruptcy court.

Consistent with the goal of centralizing all disputes, Debtors filed an omnibus insurance coverage adversary proceeding (the "Omnibus Proceeding") in the bankruptcy court in January 1991, against Wausau and forty other insurance companies seeking an adjudication of *all* the disputes between Debtors and their insurance carriers,

including disputes with Wausau which were then pending in two state court actions in the Circuit Court of Hillsborough County, Florida (the "Hillsborough Actions") but had been stayed under the October 17th Order.

Notwithstanding their longstanding position that the Omnibus Proceeding in the bankruptcy court is the only appropriate forum for resolution of *all* Debtors' insurance disputes, on August 27, 1991, Debtors sought to modify the October 17th Order to allow further proceedings against Wausau alone before the state judge in the Hillsborough Actions. On September 19, 1991, Wausau removed the two Hillsborough Actions to the federal district court as claims related to Debtors' bankruptcy cases pursuant to 28 U.S.C. § 1452(a). On October 4, 1991, Debtors moved the bankruptcy court for an order remanding the Hillsborough Actions to state court. Wausau opposed this motion on the ground, *inter alia*, that the bankruptcy court, as an Article I legislative court, lacked jurisdiction to enter a final order denying Wausau its access to federal jurisdiction and, at best, could make recommendations to the district court.

On November 27, 1991, the bankruptcy court signed final orders remanding the Hillsborough Actions to the Florida state court (the "Remand Orders") and modifying the October 17th Order to allow the Hillsborough Actions to proceed to the entry of an order against Wausau of partial summary judgment (the "Lift Stay Order").

B. The District Court Appeal

On December 4, 1991, Wausau filed its notices of appeal of the Remand Orders and of the Lift Stay Order. On December 19, 1991, the clerk of the bankruptcy court transmitted the record for the three appeals to the district

court. Wausau's motions for consolidation of the appeals and for stay pending appeal were filed in the district court on December 27, 1991.

On January 9, 1992, the district court *sua sponte*, and without any notice to or briefing from the parties, entered an order which erroneously viewed one of the Remand Orders appealed from as interlocutory, treated the notice of appeal as a motion for leave to appeal and dismissed the appeal (the "District Court Order ").[1]

C. The Eleventh Circuit Appeal and Mandamus Petition

By notice of appeal dated February 10, 1992, Wausau appealed the District Court Order to the Eleventh Circuit (Case No. 92-2125). This appeal subsequently was consolidated with Wausau's appeal from the August 27, 1992 Order denying reconsideration of the District Court Order (Case No. 92-2971) and Wausau's Petition for Writ of Mandamus, dated July 2, 1992 (Case No. 92-2658) (the

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1. On January 15, 1992, Wausau filed a motion for relief from the District Court Order, asked the district court to exercise its jurisdiction to correct the error of the clerk below denominating the appeal as interlocutory and sought a determination that the bankruptcy court order appealed from is final, or in the alternative, for leave to appeal.

   By Order entered August 27, 1992 (the "August 27, 1992 Order"), District Judge Hodges (i) denied Wausau's motion for relief or reconsideration of the January 9, 1992 District Court Order and (ii) denied Wausau's motion for determination that the bankruptcy court order appealed from is a final order and for leave to appeal. In the interim, on February 19, 1992, the state court judge entered certain rulings in the remanded litigation.

"Mandamus Petition"). Oral argument of the consolidated appeals took place on January 28, 1993.

Wausau did not seek to have the Eleventh Circuit reverse the bankruptcy court's decision on the merits. Rather, Wausau only sought that the court of appeals direct the district court, as an Article III court, to review on a complete record the bankruptcy court's decision remanding the Hillsborough Actions to state court.

D. Disposition of the Appeals and the Mandamus Petition

The Eleventh Circuit dismissed the consolidated appeals of Wausau in a two sentence order, dated March 5, 1993, stating without any analysis that the District Court Order was not reviewable.[2] By separate order on the same day, Wausau's Mandamus Petition was denied. Wausau timely filed its petition for rehearing and suggestion of rehearing en banc, which was denied on May 12, 1993. Wausau hereby makes this petition for writ of certiorari in light of the important constitutional issues implicated by these decisions.

REASONS FOR GRANTING THE WRIT

The court of appeals' summary dismissal of the consolidated appeals and Mandamus Petition denied Wausau its right to review by an Article III court of the bankruptcy court's decision denying access to the federal courts. In so

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2. The order of the Eleventh Circuit dismissing Wausau's consolidated appeals provides in its entirety:

> The district court's January 9, 1992, order dismissing the appeal from the bankruptcy court's order is not reviewable by this Court. Therefore, this appeal is dismissed for lack of jurisdiction.
>
> APPEAL DISMISSED.

doing, the Eleventh Circuit disregarded the Constitution and the express holdings of this Court in *Marathon* and *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976).

This Court should grant certiorari given the important constitutional issues raised here as to the jurisdiction and powers of the Article I bankruptcy courts and the constitutional requirement that decisions eliminating access to a federal forum granted by Congress in the Judiciary Code be subject to review by an Article III court.

THE COURT OF APPEALS' DECISION CONFLICTS WITH THE CONSTITUTION AND DECISIONS OF THIS COURT

By Refusing to Review the District Court Order, the Eleventh Circuit Ignored the Constitution and Decisions of This Court Establishing That a Litigant's Right to an Adjudication by an Article III Court Is Not Satisfied by an Unreviewed Decision of an Article I Tribunal Lacking Federal Judicial Power

Constitutional considerations require that a writ of mandamus be issued to the court of appeals to instruct the district court to vacate its dismissal of Wausau's appeal and review the Remand Order of the bankruptcy court on the merits. As the Eleventh Circuit itself held in *In re Goerg* and *In re Parklane/Atlanta Joint Venture*,[3] constitutional dictates enumerated by this Court in *Marathon*, as reinforced in

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3. The Eleventh Circuit ignored its own precedent in dismissing Wausau's appeal. The Eleventh Circuit had held that permitting a bankruptcy court to dictate the jurisdiction of an Article III court "would be an impermissible exercise of the judicial power of the United States by a non-Article III court." *In re Parklane*, 927 F.2d

(Footnote continued)

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989),[4] preclude the jurisdiction of Article III courts from being placed within the unfettered and unreviewable discretion of Article I bankruptcy tribunals.

In *Marathon*, this Court held that it was an unconstitutional exercise of the judicial power of the United States for judgments and orders of the Article I bankruptcy courts adjudicating private rights to be subject to district court review on appeal only under the deferential "clearly erroneous" standard of review. The holdings below in this case are even more constitutionally suspect than those at issue in *Marathon*, since neither the district court nor the court of appeals ever undertook any substantive review of the order of an Article I court which remanded the Hillsborough Actions to the state court.

(Footnote continued)
532, 538 (11th Cir. 1991) (affirming district court order withdrawing the reference to hear motion to dismiss or abstain, as permitting bankruptcy court to enter nonreviewable order dismissing the case would "terminate the district court's jurisdiction over the instant case without review by an Article III court" and "would place the jurisdiction of an Article III court within the discretion of an Article I court"); *see also In re Goerg*, 930 F.2d 1563, 1566 (11th Cir. 1991) (district court required under the Constitution to undertake *de novo* review of bankruptcy court order to dismiss or to abstain in favor of state court jurisdiction).

4. In *Granfinanciera*, this Court reaffirmed its holding in *Marathon* that an Article III analysis is appropriate in examining whether a party's rights to adjudication by a jury in an Article III court are affected by relegating the proceeding to an Article I tribunal. This Court held that the power of Congress to prescribe bankruptcy laws and set up specialized courts thereunder can not take away a party's constitutional right to such an adjudication by an Article III court in a matter involving private rights.

In response to *Marathon*, Congress designated bankruptcy judges and bankruptcy courts in each district as "a unit of the district court." 28 U.S.C. § 151. As such, bankruptcy courts have limited powers, and *de novo* review by the district court is required in many instances to prevent the bankruptcy courts from unlawfully and unconstitutionally exercising Article III judicial powers. As this Court held in *Marathon*, "the requirement of *de novo* review by an Article III court was not simply the question of due process in relation to notice and hearing, but was rather a question of the appropriate maintenance of the Federal judicial power." 458 U.S. at 82 n.33 (quoting *Crowell v. Benson*, 285 U.S. 22, 56 (1932)). Wausau was denied *de novo* review. Indeed, no review occurred here to validate the bankruptcy court's issuance of an order remanding the Hillsborough Actions to state court.

Mandamus Should Issue to Prevent Nullification of the Removal Statutes by an Unreviewed Decision of a Non-Article III Court Remanding a Case Within the Federal Jurisdiction to State Court

This Court held in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), that the courts of appeals have both the authority *and the duty* to use their mandamus powers "to prevent nullification of the removal statutes by remand orders resting on grounds having no warrant in the law." *Thermtron*, 423 U.S. at 353 (reversing district court order remanding action to state court and specifically holding that courts of appeals have jurisdiction to entertain writ of mandamus notwithstanding limitation on appellate jurisdiction set forth in 28 U.S.C. § 1447(d)).

The failure of the court of appeals to instruct the district court to exercise its appellate jurisdiction conflicts with the Constitution, *Thermtron* and the principles of *Marathon*.

The district court below simply dismissed the appeal, stating as its only reason Wausau's purported failure to satisfy the standard applicable to interlocutory appeals, as set forth in case law interpreting 28 U.S.C. § 158(a). Such a dismissal in no way constituted the required substantive review of the bankruptcy court's Remand Order on the merits. The court of appeals then dismissed Wausau's appeal to it and denied the Mandamus Petition.[5] The result is that the bankruptcy court deprived Wausau of its access to a federal forum without any substantive review of its ruling by an Article III court.

Wausau has been denied its constitutional right to have an Article III court determine whether Wausau might litigate in the federal courts. Wausau would be prejudiced irreparably absent review of such rulings by this Court at this time. Appellate review would be wholly ineffectual after entry of final judgment as the state court's partial summary judgment would be wholly and inextricably intertwined in the bankruptcy court's final judgment in the Omnibus Proceeding.

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5. There currently exists a conflict among the circuits with regard to the interpretation of the statute governing removal and remand applicable to a bankruptcy adversary proceeding as set forth in 28 U.S.C. § 1452. The Third Circuit reads Section 1452(b) literally, as barring review by the courts of appeal only if remands were issued "on any equitable ground," but permitting review of remands based on legal or jurisdictional grounds. *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984). In contrast, the Seventh Circuit reads the word "equitable" in Section 1452(b) to mean equitable *or* legal, as appropriate, and bars any review where the district court gives a reason authorized by statute. *Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223 (7th Cir. 1991) (dismissing appeal from remand order for want of jurisdiction). Under either interpretation of the statute, Wausau's appeal to the court of appeals should not have been dismissed since Wausau did not seek appellate court review of the merits of the Remand Order but sought only a direction to the district court to exercise its jurisdiction.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit and reverse and remand this case with instructions to issue a writ of mandamus requiring the district court to exercise its jurisdiction over the bankruptcy court.

Respectfully submitted,

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APPENDIX

APPENDIX A

Filed March 5, 1993

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 92-2125 & 92-2971

D.C. Docket No. 91-1849-CIV-T-10C

IN RE: THE CELOTEX CORPORATION, ET AL.,
Debtors.

EMPLOYERS INSURANCE OF WAUSAU,
Plaintiff-Appellant,

versus,

THE CELOTEX CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

Before: HATCHETT and BLACK, Circuit Judges, and
DYER, Senior Circuit Judge.

PER CURIAM:

The district court's January 9, 1992, order dismissing the appeal from the bankruptcy court's order is not reviewable by this Court. Therefore, this appeal is dismissed for lack of jurisdiction.

APPEAL DISMISSED.

APPENDIX B

Filed March 5, 1993

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-2658

D.C. Docket No. 91-1849-CIV-T-10C

IN RE: EMPLOYERS INSURANCE OF WAUSAU,

Petitioner.

On Petition for Writ of Mandamus to the
United States District Court for the
Middle District of Florida

Before: HATCHETT and BLACK, Circuit Judges, and
DYER, Senior Circuit Judge.

PER CURIAM:

The petition for writ of mandamus is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:

THE CELOTEX CORPORATION, et al.,
Debtors.

THE CELOTEX CORPORATION, et al.,
Plaintiffs/Appellees,

-vs-

EMPLOYERS INSURANCE OF WAUSAU,
Defendant/Appellant.

CASE NO. 91-1849 Civ-T-10(C)
(Bankruptcy Nos. 90-10016-8B1
and 90-10017-8B1)

CASE NO. 91-1849 Civ-T-10(C)

ORDER

This case is before the Court on the Appellant's motion for leave to appeal. Appellant seeks leave to appeal the order entered by the Bankruptcy Court granting the Debtors' motion to remand this adversary action to state court.

District courts are authorized to hear interlocutory appeals from bankruptcy courts. 28 U.S.C. § 158(a). However, the appellant must obtain leave of court before the

interlocutory appeal may proceed. *Id.* Although neither the statute nor the Bankruptcy Code or Rules provide specific standards for determining whether an interlocutory appeal should be allowed to proceed, several courts have relied upon the criteria set forth in 28 U.S.C. § 1292(b).[1] *See In re Warner*, 94 B.R. 734, 738 (M.D.Fla.1988); *In re Charter Co.*, 778 F.2d 617, 620 n.5 (11th Cir. 1985); *In re Kelton Motors, Inc.*, 127 B.R. 548, 550 (D.Vt. 1991). The motion for leave to appeal should be granted only if the bankruptcy court's order "involves a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ." 28 U.S.C. § 1292(b).

After reviewing the order entered by the bankruptcy court, this Court concludes that the Appellant cannot satisfy the foregoing test. It is clear that the first prong of the test is not implicated here. The granting of a motion to remand does not involve a controlling question of law as to which there is substantial ground for difference of opinion.[2] In addition, allowing an immediate appeal from the bankruptcy court's order would not materially advance the ultimate termination of this litigation. To the contrary, permitting an appeal at this time would only serve to delay these proceedings, to the detriment of creditors and other interested

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1. Section 1292(b) governs discretionary interlocutory appeals from the district courts to the courts of appeals.

2. Because the criteria listed in §1292(b) are conjunctive and there is no controlling question of law, the motion for interlocutory review could be denied on this basis alone.

parties. Therefore, the motion for leave to appeal the instant order of the bankruptcy court must be denied.

Accordingly, upon due consideration, the motion for leave to appeal is DENIED and the appeal is DISMISSED. The Clerk is directed to close the file.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 9th day of January, 1992.

/s/ W. Terrell Hodges
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN RE:
THE CELOTEX CORPORATION, et al.,

Debtors.

THE CELOTEX CORPORATION,

Plaintiff,

v.

THE AETNA CASUALTY & SURETY CO., ET AL.

Defendants.

Chapter 11 Consolidated Case Nos.:
90-10016-8B1 and
90-10017-8B1

Adversary No. 91-0611

(Removed from Thirteenth Judicial Circuit Court in and for Hillsborough County, Florida, Case No. 79-5885)

ORDER GRANTING DEBTORS' MOTION TO REMAND THE HILLSBOROUGH ACTION PURPORTEDLY REMOVED BY EMPLOYERS INSURANCE OF WAUSAU

THIS MATTER was presented to the Court on October 25, 1991, to consider the Debtors' Motion to Remand the Hillsborough Action Purportedly Removed by Employers Insurance of Wausau (the "Motion"). Present at the hearing were Jeffrey W. Warren, Esq. and Charles P. Schropp, Esq. for the debtors and Ronald L. Cohen, Esq., Rolf E. Gilbertson and Paul L. Gingras, Esq. for Employers Insurance of Wausau, and numerous other interested parties. The Court, having considered the Motion, the record in (a) the removed case, (b) the Debtors' bankruptcy cases and (c) the Debtors' Omnibus Insurance Adversary, the memoranda of the parties in support and opposition to the Motion, the arguments of counsel, and being otherwise fully advised in the premises, determines that the Motion should be granted. Accordingly, it is

ORDERED as follows:

1. The Debtors' Motion to Remand the Hillsborough Action Purportedly Removed by Employers Insurance of Wausau is granted and the state court case styled: *The Celotex Corporation, Plaintiff v. Aetna Casualty & Surety Co., et al., Defendants,*. Case No. 79-5885, pending in the Thirteenth Judicial Circuit in and for Hillsborough County, Florida is hereby remanded to the state court.

2. All pending motions filed with this Court relating to the removed case are hereby denied as moot.

3. A separate order will be entered in the main bankruptcy consolidated case regarding the status of continuation of the stay as to this litigation upon its remand to the state court.

DONE AND ORDERED at Tampa, Florida this 27th day of November, 1991.

/s/ THOMAS E BAYNES, JR.
UNITED STATES BANKRUPTCY JUDGE

cc: Debtors
Jeffrey W. Warren, Esq.
Charles P. Schropp, Esq.
Ronald L. Cohen, Esq.
Rolf E. Gilbertson, Esq.
Paul L. Gingras, Esq.
John Emmanuel, Esq.
W. Gray Dunlap, Jr., Esq.
Oscar Blasingame, Esq.

APPENDIX E

Filed May 12, 1993

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-2125
92-2971

THE CELOTEX CORPORATIONS, ET AL.,
Debtors,

EMPLOYERS INSURANCE OF WAUSAU,
Plaintiff-Appellant,

versus,

THE CELOTEX CORPORATION,
Defendant-Appellee.

On Appeal from the United States District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Opinion March 5, 1993

Before: HATCHETT and BLACK, Circuit Judges, and
DYER, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

APPENDIX F

Filed May 12, 1993

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-2658

IN RE:

EMPLOYERS INSURANCE OF WAUSAU,
Petitioner.

On Petition for Writ of Mandamus to the
United States District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

ORDER March 5, 1993

Before: HATCHETT and BLACK, Circuit Judges and
DYER, Senior Circuit Judge

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

APPENDIX G

Filed August 27, 1992

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:

THE CELOTEX CORPORATION, et al,
Debtors.

THE CELOTEX CORPORATION, et al,
Plaintiffs/Appellees,

-vs-

EMPLOYERS INSURANCE OF WAUSAU,
Defendant/Appellant.

CASE NO. 91-1849 Civ-T-10(C)
(Bankruptcy Nos. 90-10016-8B1
and 90-10017-8B1)

CASE NO. 91-1849 Civ-T-10(C)

ORDER

This matter is before the Court on several motions that all arise from Defendant/Appellant Wausau's motion (Doc. 8) for relief from, or in the alternative for reconsideration of, an Order this Court entered on January 9, 1992 (Doc. 7).

On November 27, 1991, the bankruptcy court entered three orders concerning the actions styled *The Celotex Corporation v. Aetna Casualty and Surety Company, et al., and Carey Canada, Inc. v. Continental Casualty Company, et al.*, which had been brought in the Thirteenth Judicial Circuit in and for Hillsborough County, Florida (Doc. 9, exhibit A). Two of the orders remanded the Hillsborough actions to state court. The third order modified a previous stay order entered by the bankruptcy court in order that the judge presiding over the state court case could make a ruling regarding Plaintiffs/Appellees Celotex Corporation's motion for partial summary judgment.[3] Thereafter, Wausau filed a notice of appeal (Doc. 1), and this Court entered an order on January 9, 1992 dismissing the appeal (Doc. 7) on the grounds that the bankruptcy court's order was not a final, appealable order.

In their motion, Wausau argues that the bankruptcy court's orders appealed from were erroneously denominated by the Clerk as "interlocutory." This Court and not the Clerk, however, made the determination that the bankruptcy court's orders are interlocutory, and therefore, not appealable. The Court has reviewed Wausau's motion and finds no reason to alter or amend the January 9 Order.

Accordingly, upon due consideration, Wausau's motion (Doc. 8) for relief or reconsideration of the Court's January 9, 1992 Order, and Wausau's motion for

---

3. The stay order, entered pursuant to § 105 of the Bankruptcy Code, specifically provided that the stay should otherwise remain in effect as to all matters concerning Plaintiffs/Appellees, including the Hillsborough actions, until further order of the bankruptcy court.

determination that orders appealed from are final, and for leave to appeal (Doc. 9) are DENIED. Celotex Corporation's motion to dismiss appeal for lack of jurisdiction (Doc. 12) and to amend opposition response (Doc. 13), and Wausau's motion to strike opposition response (Doc. 15) are rendered MOOT and require no further judicial action.

IT IS SO ORDERED.

DONE AND ORDERED at Jacksonville, Florida, this 25th day of August, 1992.

/s/ W. Terrell Hodges
UNITED STATES DISTRICT JUDGE

Copy to counsel of record

APPENDIX H

28 U.S.C. § 158

§ 158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.
(2) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.
(3) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.
(4) A panel established under this section shall consist of three bankruptcy judges, provided a bankruptcy judge may not hear an appeal originating within a district for which the

judge is appointed or designated under section 152 of this title.

(c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

(July 10, 1984, P.L. 98-353, Title I, § 104(a), 98 Stat. 341.) (As amended Dec. 1, 1990, P.L. 101-650, Title III § 305, 104 Stat. 5105.).

28 U.S.C. § 1452

§ 1452. Removal of claims related to bankruptcy cases

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

(As amended December 1, 1990, P.L. 101-650, Title III, § 309(c), 104 Stat. 5113.)

Supreme Court, U.S.
FILED
SEP 13 1993
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No. 93-227

In The

Supreme Court of the United States

October Term, 1993

EMPLOYERS INSURANCE OF WAUSAU,

Petitioner,

v.

THE CELOTEX CORPORATION,

Respondent.

On Petition for Writ Of Certiorri To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

First, Celotex does not agree with Wausau's statement of the question, whether a mandamus writ should issue to review "the merits of a bankruptcy court's order remanding an action to state court. . . . " Petition at (i).

This is because, in the adversary proceeding, the bankruptcy court will decide the claim or cause of action that Wausau removed from the state court.

Second, Wausau fails to satisfy the Court's stringent mandamus requirements under Sup.Ct.R. 20.

A related question is whether Wausau seeks mandamus, certiorari or both, it having apparently urged both remedies. Petition at title page, (i), 7, 11.

Celotex does not believe that any question is presented as to the Eleventh Circuit's refusal to hear Wausau's appeal or mandamus petition. 28 U.S.C. §1452(b). The same consideration applies here, the Court being without jurisdiction to consider certiorari. *Id.*

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No. 93-227

In The

Supreme Court of the United States

October Term, 1993

EMPLOYERS INSURANCE OF WAUSAU,

Petitioner,

v.

THE CELOTEX CORPORATION,

Respondent.

On Petition for Writ Of Certiorri To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

Respondent, The Celotex Corporation, opposes the issuance of a writ of certiorari or a writ of mandamus to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in the above-entitled case.

STATEMENT OF THE CASE

This is a case of two cases: 1) since 1979 Celotex has pursued an insurance coverage dispute against Wausau in state court; and 2) shortly after filing its Chapter 11 petition on October 12, 1990, Celotex commenced an adversary proceeding in the bankruptcy court as described by Wausau in its Statement of the Case. Petition at 3-4. By this adversary proceeding, Celotex seeks the same relief that it claimed in the state court action.

On November 27, 1991, the bankruptcy court remanded the 1979 state court action that Wausau had removed. Pet.App. at 6a-8a. This remand was "for the sole purpose of permitting the Honorable John G. Hodges to enter a written order on an already announced ruling on Celotex' Motion for Partial Summary Judgment" against Wausau in the state court action. Bankruptcy Court Order Granting Debtor's Motion for Order Modifying Stay to Allow Entry of Order Granting Celotex' Motion for Partial Summary Judgment ("Order Modifying Stay"), Cel.App. at 1a-2a. The state court cause of action remained stayed in all other respects. *Id.*

On January 9, 1992, the district court denied Wausau's motion for leave to appeal, *Petition at 5*, and later, upon Wausau's motion for relief or reconsideration, stated: "The Court has reviewed Wausau's motion and finds no reason to alter or amend the January 9 Order." Pet.App. at 13a.

ARGUMENT

I. Wausau's contentions are without substance.

In as much as the bankruptcy court has not yet entered its final order (as to which appellate review is available), Wausau's attempt to invoke the Court's jurisdiction is without merit. By remanding the state claim or cause of action, the bankruptcy court did not withdraw from deciding the merits of the case. Therefore, Wausau's posited appellate review issue is redundant. The bankruptcy court has retained jurisdiction over the dispute between Wausau and Celotex and will ultimately enter an order or orders resolving that dispute. If Wausau is unsuccessful in the bankruptcy court, two appellate tribunals are available for relief, the district court and the Eleventh Circuit.

Celotex' 1979 state court case against Wausau was removed to the bankruptcy court. Then, the bankruptcy judge made it possible for the state court judge to reduce to written order his announced decision on Celotex' motion for partial summary judgment. Order Modifying Stay, Cel.App. at 1a-2a. To accomplish that, it was necessary to remand the case.[1] That left the bankruptcy court with Celotex' adversary proceeding, which includes a cause of action which is substantively identical with the removed/remanded state court action.

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[1] The point is self evident: the important order was the bankruptcy court's Order Modifying Stay, Cel.App. at 1a, but because Wausau had removed the state court case, the bankruptcy judge found it also necessary to remand so that the state court judge would have a case within which to enter his partial summary judgment order.

While it is not necessary to speculate about Wausau's motive in removing the state court case at a time prior to the judge's entering a written order on a previously announced partial summary judgment ruling, it is correct to say that the cause of action which is at the core of *each* case will be heard by the bankruptcy court. Stated somewhat differently, Wausau's appeal of the remand order to the district court, its motion for reconsideration in the district court, and its subsequent appeal to the Eleventh Circuit has not been a productive, substantive or meaningful course, precisely for the reason that its removed case is "dormant" in the state court. Because, as Wausau writes, Celotex obtained the stay provided by the October 17th Order with the view of centralizing all disputes in the bankruptcy court. Petition at 3.

On January 9, 1992, the district court denied Wausau's appeal, treating it as interlocutory, and declined to give Wausau leave to appeal the bankruptcy court's remand order because it did not involve "a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order would not materially advance the ultimate termination of this litigation. . . . " (citing 28 U.S.C. § 1292(b)). Pet.App. at 4a. On August 27, 1992, the district court revisited Wausau's contentions, again declining to grant an appeal, observing in footnote 3: "The stay order, entered pursuant to § 105 of the Bankruptcy Code, specifically provided that the stay should otherwise remain in effect [as to the 1979 state court cause of action]. . . . " Pet.App. at 13a.

II. Wausau has not shown any basis for extraordinary writ relief.

A. Mandamus

The writ of mandamus has been used only to confine an inferior court to the lawful exercise of its jurisdiction or to compel it to act when it has a duty to do so. *Roche v. Evaporated Milk Assoc.*, 319 U.S. 21, 26 (1943). Even then, the writ will issue only after the petitioner has demonstrated a clear abuse of discretion or conduct amounting to "usurpation of [the judicial] power." *Mallard v. United States District Court*, 490 U.S. 296, 309 (1989).

The remaining two requirements for mandamus are, first, the absence of adequate means to obtain the relief that petitioner seeks, primarily the lack of a remedy by direct appeal, *Mallard*, 490 U.S. at 309; *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam). Second, petitioner must satisfy "the burden of showing that his right to issuance of the writ is 'clear and indisputable.' " *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953) (quoting *United States v. Duell*, 172 U.S. 576, 582 (1899)).

Viewing these authorities, and utilizing common sense, Wausau will have the right to appeal whatever adverse judgment the bankruptcy court might enter. An "appeal" (for which mandamus may not be substituted, *Bankers Life*, 346 U.S. at 383) of the remand order at this stage (assuming *arguendo* that the district court did not afford that right) would be meaningless: as we understand Wausau's argument here, it seeks a writ compelling the district court to hear its appeal of a remand order

(that the bankruptcy court judge entered to facilitate the court's *Order Modifying Stay, Cel.App. at 1a*) whereby the state court judge is limited to entering a partial summary judgment, and under circumstances wherein the bankruptcy court will try the cause of action that Wausau removed to the bankruptcy court. After the bankruptcy court has concluded its consideration of the Celotex adversary proceeding against Wausau, and assuming that Wausau believes that error has been committed, or that the findings are clearly erroneous, it is entitled to take its appeal to the district court and, if still dissatisfied, to the Eleventh Circuit.

B. Supreme Court Rule 20.1

Wausau is not entitled to a writ of mandamus because it has not shown that such will be in aid of the Court's appellate jurisdiction, or that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, or that adequate relief cannot be obtained in any other form or from any other court.

Although Wausau ignores the distinctions between mandamus and certiorari, 28 U.S.C. 1452(b) eliminates any possibility of certiorari review here. Pet.App. at 17a.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN RE: THE CELOTEX CORPORATION, et al., Debtors. _____/	Chapter 11 Consolidated Case Nos. 90-10016-8B1 and 90-10017-8B1

ORDER GRANTING DEBTOR'S MOTION FOR ORDER MODIFYING STAY TO ALLOW ENTRY OF ORDER GRANTING CELOTEX' MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER was presented to the Court on October 25, 1991, to consider the Motion for Order Modifying Stay to Allow Entry of Order Granting Celotex' Motion for Partial Summary Judgment (the "Motion") filed by the Debtor, The Celotex Corporation. Present at the hearing was Jeffrey W. Warren, Esq. and Charles P. Schropp, Esq. for the Debtors and Ronald L. Cohen, Esq., Rolf E. Gilbertson and Paul L. Gingras, Esq. for Employers Insurance of Wausau, and numerous other parties. The Court, having considered the Motion and the record in (a) the Debtors' bankruptcy cases, (b) the Debtors' Omnibus Insurance Adversary, and (c) the state court litigation related to the Motion, as well as having considered the memoranda of the parties relating to the Motion and arguments of counsel, and being otherwise fully advised in the premises, determines that the Motion should be granted. Accordingly, it is

ORDERED as follows:

1. The stay created by this Court's Order Granting Emergency Motion for Determination of Applicability of

§362 Stay to Pending Matters Or, In the Alternative, For Extension of §362 Stay to Pending Matters entered on October 17, 1990 (the §105 Stay Order) is modified for the sole purpose of permitting the Honorable John G. Hodges to enter a written ruling on Celotex' Motion for Partial Summary Judgment as to Employers Insurance of Wausau in the state court case styled *The Celotex Corporation, Plaintiff v. Aetna Casualty & Surety Co., et al. Defendants*, Case No. 79-5885, pending in the Thirteenth Judicial Circuit in and for Hillsborough County, Florida (the "Hillsborough Action).

2. Except as provided in this Order, the stay of all matters involving the Debtors pursuant to 11 U.S.C. §362 and the express §105 Stay Order will continue to apply to all pending matters involving the Debtors, including the Hillsborough Action, until this Court enters a specific order modifying the stay as to that matter.

DONE AND ORDERED at Tampa, Florida this 27 day of Nov., 1991.

/s/ Thomas E. Baynes, Jr.
THOMAS E. BAYNES, JR.
UNITED STATES
BANKRUPTCY JUDGE

cc: Debtors
Jeffrey W. Warren, Esq.
Charles P. Schropp, Esq.
Ronald L. Cohen, Esq.
Rolf E. Gilbertson, Esq.
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Core Service Group by Counsel for the Debtors

Supreme Court, U.S.
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SEP 2 1993
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No. 93-227

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

EMPLOYERS INSURANCE OF WAUSAU,

Petitioner,

v.

THE CELOTEX CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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BEST AVAILABLE COPY

Petitioner, Employers Insurance of Wausau ("Wausau") seeks a writ of certiorari to reverse and remand the Eleventh Circuit's refusal to issue a writ of mandamus requiring the district court (M.D. Fla.) to exercise its jurisdiction over the bankruptcy court. Respondent, The Celotex Corporation ("Celotex") opposes review of the inaction of the courts below yet fails even to cite let alone seek to distinguish a single one of the eight controlling cases relied on in Wausau's petition (the "Petition").

Celotex makes two arguments. First, Celotex argues that this Court lacks authority as a matter of law to review the courts below. In so doing, Celotex wholly ignores the controlling precedent of Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976), cited in the Petition (at 7,9). In Thermtron, this Court held decisively that appellate review of a remand decision by mandamus is appropriate if the district court did not remand based on a statutorily permissible reason. Here, Celotex does not contest that the district court denied leave to review the remand decision, never considered the statutory bases for remand, and the court of appeals declined to hear the appeal and denied mandamus.

Second, Celotex argues that "the bankruptcy court will decide the claim or cause of action that Wausau removed from the state court." Opp. Br. at 1. If viewed as a factual claim, Celotex is wrong and contradicts the record, since Celotex sought and obtained an order remanding the removed claim and concluding federal jurisdiction over the remanded adversary proceeding. Pet. App. 6a-8a. If viewed less literally, Celotex is arguing that the bankruptcy court will, in a different adversary proceeding, resolve the legal issues for which the bankruptcy court remanded this proceeding. Yet to state the argument is to refute it: the bankruptcy court should have consolidated the two

proceedings, avoiding piecemeal litigation and resolved the issue remanded to the state court rather than defer to the decision of the state court. Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 10 n.11, 19-26 (1983) (reversing district court stay of proceeding where such stay results in an essential part of the federal suit being litigated in a state forum).

The action at issue here was effectively removed from the federal system by an Article I court. The heart of Wausau's appeal is a simple and limited request that an Article III court review the merits of such remand, which the district court did not do here. Contrary to the assertion of Celotex that the bankruptcy court has not yet entered a final order (Opp. Br. at 3), the bankruptcy court's remand order was a final order and constitutional concerns require full review by an Article III court.[1]

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1. See In re Tarnow, 749 F.2d 464, 465 (7th Cir. 1984) (Posner, J.) (bankruptcy court order ending adversary proceeding was final order); Scherer v. Carroll, 150 B.R. 549 (D. Vt. 1993) (bankruptcy court remand order constitutes final order reviewable by district court); In re Atron Inc. of Michigan, 1993 U.S. Dist. LEXIS 6848, *3 (W.D. Mich. March 9, 1993) (remand order appealable as a final order); In re Tandem Enterprises, 124 B.R. 283, 284 n.2 (Bankr. N.D. Ill. 1991) (1990 amendment to Section 1452(b) "strengthens bankruptcy court authority to order remands by providing a clear and immediate avenue of appeal"); Brizzolara v. Fisher Pen Co., 1993 Bankr. LEXIS 1340, *20-21 (Bankr. N.D. Ill. Sept. 15, 1993) (effect of 1990 Amendments permits bankruptcy courts to enter final remand orders subject to district court appeal). See also In re Axona, 924 F.2d 31, 35 (2d Cir. 1991) (bankruptcy court's abstention order under 11 U.S.C. § 305, which contains bar of appeal to courts of appeal and Supreme Court similar to 28 U.S.C. § 1452, held to be final order appealable to district court and "[s]uch Article III review of bankruptcy court decisions removes any constitutional concerns"); In re Shell Oil, 966 F.2d 1130, 1132 (7th Cir. 1992) (order remanding case to state court is a "terminal disposition" so far as the federal courts are concerned).

Celotex's claim that the Eleventh Circuit and this Court lack jurisdiction due to the prohibition on appeals of bankruptcy remand decisions in 28 U.S.C. §1452(b) (Opp. Br. at 6) misses the point. Wausau's Petition ultimately seeks to have the district court review the remand order on the merits, something that was never done, not to have this Court or the court of appeals consider in the first instance whether remand is appropriate.[2]

In short, the district court applied the wrong standard of review when it utilized the test for interlocutory appeals found in 28 U.S.C. § 1292(b). The proper course of action would have been to examine the bankruptcy court's remand order on a de novo basis consistent with Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 82 n.33, 86 (1982); cf. Pet. at 9. As Celotex conceded in papers filed in the district court, review by a district court of a bankruptcy remand order is required to satisfy the constitutional concerns of Marathon. Failure to provide such de novo review denies a party -- here Wausau -- its right to an adjudication on the merits by an Article III court.

The extraordinary facts of this case show that a bankruptcy court has been allowed to adjudicate private rights and limit access to Article III courts without any substantive review by the district court or court of appeals. Celotex concedes that mandamus is appropriate to confine an inferior court to the lawful exercise of jurisdiction or to

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2. Contrary to the misleading statement on page 2 of the Opp. Br., Wausau did not initially bring a motion to the district court for leave to appeal. Wausau has consistently maintained that constitutional considerations dictate review by an Article III Court, and that the remand order was appealable to the district court as of right. The January 9, 1992 district court order resulted from that court treating Wausau's notice of appeal as a motion for leave to appeal and denying such motion pursuant to Fed.R.Bankr.P. 8003(c). Pet. App. 3a-5a.

compel it to act when it has a duty to do so where a clear abuse of discretion or conduct amounting to "usurpation of [the judicial] power" has been shown. Mallard v. U.S. District Court, 490 U.S. 296, 309 (1989); see Opp. Br. at 5; see also Thermtron. The unreviewed exercise of the judicial power of the United States by an Article I court that has occurred in this case is precisely the scenario to which Mallard applies. Therefore, the issuance of a writ of mandamus is necessary to instruct the district court to exercise its jurisdiction and review the bankruptcy court's remand order on the merits.

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